THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

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RESPONSE BY

THE ERISA INDUSTRY COMMITTEE (ERIC)

TO THE BIPARTISAN WORKING GROUP ON PAID LEAVE

REQUEST FOR INFORMATION ON

EXPANDING ACCESS TO PAID PARENTAL, CAREGIVING, AND PERSONAL MEDICAL LEAVE

January 31, 2024

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Dear Bipartisan Working Group Members:

The ERISA Industry Committee ("ERIC") is thankful for the opportunity to provide our perspective to the bipartisan, bicameral Congressional working group on paid leave ("Working Group"). On behalf of our large-employer member companies, thank you for the critical work you are doing to understand and address the complex challenges that workers and employers face today.

For background, ERIC is a national advocacy organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans. ERIC member companies offer benefits to tens of millions of employees, located in every state, city, and Congressional district. Your constituents engage with ERIC member companies many times a day, such as when they drive a car or fill it with gas, use a cell phone or a computer, watch TV, dine out or at home, enjoy a beverage or snack, use cosmetics, fly on an airplane, visit a bank or hotel, benefit from our national defense, receive or send a package, or go shopping.

For decades, employers like ERIC member companies have led the charge in designing gold-standard paid leave benefits that support and empower their nationwide workforces when time away from work is needed. While large employers have never asked for help with funding or administering these benefits, a growing patchwork of inconsistent state and local paid leave laws make it impossible for employers to design consistent, uniform benefits to all employees regardless of work location. That's why multistate employers and the millions of Americans that they employ need Congress to come together in support of addressing this growing patchwork.

Executive Summary

Since our modern understanding of family and medical leave was established by federal law over 30 years ago, large, multistate employers have remained at the forefront of innovating and providing generous *paid* leave benefits to their nationwide workforces. Unfortunately, a consequence of states expanding access to paid family and medical leave benefits is that complex and incompatible state laws have generated counterproductive compliance costs and made uniform administration of effective employer-provided benefits impossible nationwide.

To expand access to these vital benefits across the country, Congress should address the administrative complexity of these important benefits across existing state laws, recognize the advantages that private benefit sources offer, and provide a pathway for uniform, national paid family and medical leave standards. ERIC therefore recommends that Congress explore 1) a federal safe harbor providing relief from the state patchwork for employers that offer premium paid family and medical leave benefits, and 2) a federal effort to harmonize national paid leave standards and incentivize much-needed reforms by existing state programs (referred to as the "I-PLAN").

Background – Foundation of Family and Medical Leave and Employer-Provided Benefits

What we refer to today as "family and medical leave" was first categorized and popularized by the 1993 enactment of the Family and Medical Leave Act (FMLA), which secured access to up to twelve weeks of unpaid leave and job protection for millions of Americans to bond with a newly born or adopted child, care for an ill family member, or tend to a serious medical issue of their own. The express purpose of this landmark law and the unpaid leave that it provides was to empower employees to take critical time away from work for serious health or family circumstances without the worry of losing their employment.

While the FMLA established a common understanding of family and medical leave, the fact that this leave is unpaid has ultimately dissuaded workers from using it and missing out on the income that they would otherwise receive while working. This reality has spurred both private employers and state lawmakers to pursue paid leave benefits that better support modern workforces. Importantly, the FMLA continues to serve as the foundation from which private and public paid leave benefits are designed and administered.

Large, multistate employers have continued to innovate how they provide paid family and medical leave since the FMLA's enactment. They recognize that these benefits foster employee well-being and aid recruiting and retaining talent. Unsurprisingly, large employers have developed flexible programs tailored to the specific needs of their employees. Multistate employers, like ERIC member companies, take pride in the high-quality paid leave benefits that they have historically been able to provide.

The Current Patchwork of Incompatible State Laws Poses Challenges for Employers and Workers

While the FMLA and advances in employer-provided benefits expanded access to family and medical leave benefits, not everyone has access. That has led to growing interest from state and local lawmakers in pursuing jurisdiction-by-jurisdiction policies to provide these benefits to a broader swath of their constituents. Beginning with California in 2002, and most recently including Minnesota and Maine in 2023, 13 states and Washington D.C. have now enacted mandatory paid family and medical leave insurance programs that operate altogether independently from one another, each collecting income-based contributions to fund benefits for qualifying workers. Unfortunately, these state programs adopt entirely unique compliance standards and employer requirements that have eroded the common understanding of family and medical leave that has existed since the FMLA's enactment.

This piecemeal approach has forced employers and employees to try to navigate a complex and ever-changing amalgam of state and local standards in which the benefits available ultimately depend on where an employee lives or works. Further, states continue to consider creating or amending paid leave programs, as more than 300 paid leave bills have been introduced and considered across nearly every state in recent years. Even some localities have gotten into the act, further complicating the situation for a broad range of stakeholders.

The fragmented state-by-state status quo has created a catch-22 in which multistate employers that want to provide a generous, uniform paid leave benefit for all nationwide employees based on the common denominators among state programs would currently be unable to do so. That is because some existing state programs do not allow substitution of private employer-provided benefits, even if those benefits are more generous than those offered by the state program, and also because differing state standards are not simply greater or less than one another but involve totally incompatible legal definitions and processes that cannot be reconciled. These realities ultimately dissuade employers from pursuing equivalent or superior private benefits, forcing them to instead enroll their employees in state programs when enacted.

Importantly, the quality and value of benefits provided by state paid family leave programs regularly pale in comparison to their more robust employer-provided equivalents, which often grant full wage replacement and a far easier administrative process for employees most in need of leave without the hassle of wage-based contributions. Unfortunately, complex state program standards and costly compliance processes discourage many employers from exploring new and innovative approaches to paid leave, instead forcing them to enroll in state-administered programs that cannot match the efficiency or quality of the benefits they were previously able to receive directly through their employer.

Furthermore, because large, multistate employers are forced to adapt to a constantly shifting paid leave landscape, they need to spend significantly more to track and comply with new or updated state laws – ironically, money that then cannot be spent on enhancing these or other benefits for their employees. It has become increasingly clear, then, that many of the workers covered by these state programs would be far better served by a uniform national framework of paid leave standards that recognize the value and support that voluntary, employer-provided benefits are uniquely able to provide.

State Laws Contain More than 50 Complex Variables that Are Impossible to Administer Uniformly

As we highlighted for the Senate Finance Committee in October of last year[1], the variance between these state and local laws does not amount to a simple difference in leave duration or level of wage replacement; rather, it includes an array of legal definitions and administrative processes that make it impossible for multistate employers to comply while operating a uniform benefits program across the country. In fact, there are more than 50 different variable policy "levers" that state laws consider and establish, all of which introduce administrative burdens and necessitate costly system changes. Some categories of these variables include:

- **Duration of leave** – The amount of paid leave time available to an employee is not as simple as setting a total number of weeks available for all covered circumstances, but must also establish guidelines for the amount of leave that can be used for individual types of leave

[1] This discussion of policy levers borrows from a statement for the record ERIC submitted to the U.S. Senate Finance Committee relating to an October 25, 2023, hearing titled "Exploring Paid Leave: Policy, Practice, and The Impact on The Workforce."

(such as parental, family, and medical), permissible use of incremental leave, minimum increments of leave, and the limitation of parental leave when both parents are with the same employer.

- **Reasons for Leave** – Similarly, the core concepts and legal definitions of what paid family and medical leave includes must be established by state lawmakers, including definitions for family, parental, medical, safe leave, qualifying exigency, public health emergency, maternity, pregnancy complication, and other types of covered leave. Not only do different state policies include or exclude different types of leave, but they regularly categorize or define them differently as well.

- **Family Member Definitions** – State lawmakers often adopt unique definitions specifying which family members qualify for an employee to take paid leave. While nearly every state law now goes beyond the coverage established by the FMLA (parents, spouses, and children) and includes grandparents, grandchildren, and siblings, an increasing number of states have also adopted their own versions of "catch-all" family member definitions without providing much-needed guidance as to what relationships qualify or what limitations remain. This presents serious compliance concerns for employers and state administrators alike.

- **Employee Eligibility** – Parallel to the benefits available to employees, lawmakers must establish which employees are covered by state paid leave and what milestones must be reached in order for an employee to qualify for benefits. These standards include, but are not limited to, the time worked for an employer, the total wages earned in a base period or calendar year, total contributions paid into the state program, coverage of independent contractors or seasonal workers, and which state's paid leave law ultimately applies to an individual worker. These standards are not only tracked and met by state administrators, but by employers as well, adding additional indirect compliance costs.

- **Employer Coverage** – Similarly, state lawmakers must decide which employers are covered by a state paid leave program. These determinations are usually made based on the number of employees an employer has within the state and often determine the portion of payroll contributions that the employer must cover.

- **Notice to Employees** – Each state policy introduces a range of notice and reporting requirements by which employers must educate their employees on the availability of state paid leave benefits or the private benefits that are available through their employer. Because states often expand the information that must be contained in these disclosures, and the time, manner, and regularity of notices vary, these processes can quickly develop into a costly burden for employers.

- **Wage Replacement** – State programs differ widely on the level of wage replacement that employees will receive when electing state paid leave benefits. Again, this is not as simple as setting a replacement rate, but instead involves a series of calculations including percentage of ordinary employee wages, percentage of state average weekly wages, and total caps on weekly wage replacement benefits that employees can receive. The result is an overly

complicated process that leaves a vast number of employees with levels of paid leave benefit wage replacement that is far lower than they would have otherwise received from their employer.

- **Contribution Rate** – The payments that employees and employers must make into state programs to fund benefits vary, creating another level of administrative complexity for multistate employers. These policy standards cover the capped percentage of an employee's wages that must be contributed, the authority of state administrators to change contribution rates in the future, and the contribution breakdown between employers and employees.

- **Job Protection While on Leave** – While job protection is a cornerstone of both unpaid and paid leave, state lawmakers have broadly defined these protections with variations establishing the rights an employee has when returning to work, requiring benefits and seniority to continue accruing while away from work, broadening definitions of "equivalent position", and even applying legal presumptions of discrimination by employers.

- **Coordination of Benefits** – A critical area of policy design revolves around how new state paid leave benefits are to interact with other sources of paid leave as well as related employee benefits that involve time away from work. As they formulate state programs, lawmakers must consider how to coordinate these benefits with the FMLA, state unpaid leave, state long-term disability laws, state paid sick leave or paid time off laws, existing employer-provided leave benefits, and collective bargaining agreements, to prevent overlap or conflict. Furthermore, lawmakers must consider how the benefits and legal definitions that they create relate to or can be better harmonized with other state paid leave laws.

- **Substitution of Equivalent Employer Benefits Plans** – Perhaps the most consequential area of state paid leave policies for large, multistate employers is the ability to provide private paid leave benefits that meet or exceed those offered by the state program and therefore be granted an exemption from mandated participation in the state program. While this is a valuable option that allows many employees to continue enjoying the benefits they already have, it is far from straightforward. In fact, state lawmakers must establish a range of standards and processes to secure this path, including minimum benefits standards, enumerated rights of employees under an equivalent plan, required surety bond with the state, application process to state administrators, state oversight of applications and appeals for substitution, regular employer recordkeeping, and reporting requirements.

- **State Preemption of Local/Municipal Laws** – Just as national paid leave uniformity is critical to design and provide reliable benefits across multiple states, paid leave uniformity within a state must be maintained for employers and employees to follow. As state lawmakers develop paid leave policies, they must consider the impact that conflicting local or municipal paid leave policies have on uniformity and benefits administration. To prevent this patchwork within a patchwork, a statewide preemption clause should be included in state legislation.

- **Administrative Processes** – Finally, state paid leave policies introduce a long list of administrative processes that, if enacted without sufficient clarity and simplicity, can create counterproductive cost burdens and compliance challenges for employers and employees. These processes include employee applications for state program benefits, timelines for approval or denial of benefits, timelines for payment of benefits, waiting periods for employees before using certain types of leave, employee appeals for denied applications, complaints to a state regarding employer administration, investigation and enforcement processes, recordkeeping and reporting requirements, and data sharing between employers and state administrators to facilitate supplemental private benefits.

Policymakers Should Avoid the Pitfalls that Have Plagued Some State Paid Leave Programs

While some states have demonstrated success in securing reliable paid leave benefits for employees within their jurisdiction, their experiences underscore the many hazards that any future federal proposal should carefully consider.

First, it is critical that paid leave laws reflect the realities of how paid leave benefits are operated by employers, including how they are effectively administered, woven into internal employer practices, used by employees, and the practical effects that different requirements have on all parties involved.

Second, lawmakers should identify the core paid leave goals they aim to achieve and narrowly focus policy efforts at effectively and efficiently meeting those goals. “More” is not always better if it leads to overstretched programs that attempt to do too much at once and result in oversized benefits, overly expansive standards, and even solvency concerns.

Third, state laws that are rushed through the legislative process often result in hurried or confusing regulatory processes, which in turn lead to incomplete and obscure implementation efforts. While state legislators regularly place responsibility for implementing paid leave programs on agency regulators, there has been a concerning trend of state laws that place broad responsibility on regulators to design the critical administrative processes needed to operate a paid family and medical leave insurance program without proper direction. The result of this broad discretion has been a series of rushed, incomplete, and often disjointed regulatory development processes that do not adequately consult with employers or employees to determine best practices or mitigate negative practical impacts.

The most pronounced example of this real regulatory development disconnect involves the formulation and implementation of exemption processes for equivalent employer benefits. As mentioned previously, because these processes are convoluted, are not designed in coordination with in-state employers, and do not consider the steep compliance costs that employers must face in order to secure an equivalent plan exemption, the private paid leave benefits offered by employers in these states have been reduced. Instead of developing tailored processes that actually encourage private employer efforts and foster improved benefits, otherwise hopeful employers have been dissuaded and discouraged from doing so. The fact that state paid leave

policies aimed at expanding access have at the same time reduced the overall quality of benefits for millions of Americans is inexcusable, should be prevented from being repeated, and must be addressed through federal policy.

Finally, the overarching lesson that can be learned from state paid leave policy efforts to date is that a jurisdiction-by-jurisdiction approach to paid leave has created impossible challenges for employees and employers across the country. Without the critical uniformity and common understanding that the FMLA once provided, Americans will be continuously forced to face an evolving patchwork of inconsistent state and local paid leave laws and struggle to navigate the growing number of counterproductive compliance requirements as a result. If access to paid leave benefits is to be expanded nationally, these hard lessons must be learned.

The Federal Government Has a Critical Role: To Develop Uniform National Standards

The Federal Government's role in national paid leave policy should first and foremost be to develop and promote uniform national standards for paid family and medical leave. As discussed previously, the federal FMLA not only provided unpaid leave to millions of Americans, but created a definition of "family and medical leave" as well as common standards for employers and employees. The growing patchwork of state and local laws has created a confusing landscape in which core concepts like definitions of family member, eligibility standards, and even qualifying circumstances for leave vary drastically from jurisdiction to jurisdiction. The paid leave access gap that exists today does so, in part, because of the fractured and conflicting standards that individual states continue to adopt independently of one another.

If the goal of future federal paid leave policy is to expand and secure access to critical benefits for more Americans across the country, Congress must begin by reestablishing a uniform understanding of what paid leave means on a nationwide basis. On the one hand, this would involve a reassessment of current FMLA and state standards to determine the areas that most need updating or expansion to meet the expectations and requirements of today's workforce. On the other hand, this would involve a concerted federal effort to bring existing state paid leave programs together, facilitate their interaction, and ultimately forge common standards and administrative processes for these programs to share.

Importantly, this would not necessarily entail dissolving existing state programs or stripping employees of benefits that they already enjoy, but setting a national course for paid leave harmonization. This could take place gradually by providing incentives for individual states to adopt uniform shared standards as well as private employers to develop and offer improved benefit programs to their workforces. By addressing the fragmented list of disparate state standards and incentivizing uniformity, Congress would seize a critical opportunity to once again unify the country and galvanize improved access to these benefits on a national basis, just as the FMLA did over 30 years ago.

Federal Policy Efforts Should Focus on Paid Family and Medical Leave

While existing state-administered paid family and medical leave insurance programs often differ from one another and the FMLA on what specific qualifying circumstances are covered, the programs do share a common understanding that family and medical leave involves long-term absence from work to address pressing medical issues affecting a worker or the worker's family. Following the FMLA, these circumstances include leave to care for and bond with a newly born or adopted child, to care for an ill family member, or to address one's own serious medical condition.

Importantly, these three primary types of paid family and medical leave are specific enough to grant employees leave under reasonable qualifying circumstances but also broad enough to provide the flexibility they need to address a wide range of personal and family medical challenges. In contrast, the long list of "other" paid leave sources that states and private employers often explore, such as sick leave, safe leave, bereavement leave, school event leave, public health leave, voter leave, etc., address distinctly separate time frames and reasons for leave that should not be conflated with the paid family and medical leave policies at hand. Any new federal paid leave policy should therefore focus solely on the well-established, long-term types of benefit that paid family and medical leave is designed to address.

Congress Should Pursue Harmonization of Paid Leave Standards

As discussed previously, the most critical goal of future federal paid leave policy should be to establish uniform national paid leave standards. Understanding that 14 distinct state paid family and medical leave insurance programs have now been enacted and that dissolving those programs is not likely a feasible approach, ERIC recommends Congress to explore and pursue two parallel frameworks for achieving much needed harmonization and ultimately improving the paid leave landscape that employees and employers currently face.

First, ERIC has long recommended the creation of a federal safe harbor or exemption process that would provide multistate employers that already provide generous paid family and medical leave benefits nationwide with relief from the current state patchwork. This path would involve establishing a single set of minimum federal paid leave standards and requirements that, if met or exceeded by an employer's private benefits, would excuse that employer from the participation and compliance requirements of similar state paid family and medical leave programs requirements that have been implemented. Importantly, this federal safe harbor standard could feature robust benefit standards that expand beyond FMLA and state foundations while at the same time incentivizing employers to continue innovation of these critical benefits. This approach would allow states to continue pursuing and operating these insurance programs to provide benefits to workers that would not otherwise receive them while allowing multistate employers the uniformity and flexibility they need to provide paid leave benefits that are ultimately more valuable than state insurance programs are able to offer.

Second, ERIC recommends that Congress consider ways in which to coordinate and harmonize the array of state programs and standards that already exist, along the lines of the

Interstate Paid Leave Action Network (I-PLAN) featured in the Legislative Framework recently released by the House Bipartisan Paid Family Leave Working Group. As outlined by the Legislative Framework, this federal effort would involve convening representatives of existing state insurance programs to pursue ways to 1) create centralized equivalency standards that could satisfy elements of each state's requirements, 2) establish uniform operational procedures to help employees and employers better navigate and access available benefits, and 3) develop shared information exchange systems to facilitate portability of benefits. To encourage these changes and improve national harmonization of paid leave, a central forum must be created to organize this interstate discussion, formulate recommendations, and ultimately award grants or other incentives to spark needed reforms by the relevant state insurance programs.

Conclusion

ERIC appreciates the opportunity to provide feedback to the Working Group and understands the desire to expand access to critical paid leave benefits on a nationwide basis. At the same time, the multistate employers that currently offer a vast portion of paid leave benefits are in need of federal relief to be able to continue providing extremely valuable programs nationwide. Any federal paid leave policy must therefore address the counterproductive challenges that the growing patchwork of inconsistent state and local laws create for employers, workers, and their families alike.

If you have any questions concerning our response above, the current state and local paid leave landscape, or how federal policy could be shaped to improve nationwide access to paid leave benefits, please contact me at abanducci@eric.org.

Sincerely,

Andy Banducci